IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 204.

NETTIE MEYER, ANNA JACOBSON, JACOB MEYERHOFF, JOSEPH MEYERHOFF, JULIUS MEYERHOFF, RAY MANN AND JOHN J. PANKIN,

Petitioners,

vs.

KENMORE-GRANVILLE HOTEL COMPANY, SAMUEL J. T. STRAUS, MELVIN L. STRAUS, M. A. ROSENTHAL ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

PETITIONER'S REPLY.

STATEMENT.

Respondents made no attempt to answer Point II of the petition (pp. 17-30) showing that notwithstanding the statement in the opinion that the court did not rest its decision on the defense of *res adjudicata* and considered the merits, the decision can only rest on the federal question. The answer of the respondents is limited to the points: (1) that no right was specially claimed under a

federal statute; (2) that the defense of *res adjudicata* was properly sustained as the Bankruptcy Court acquired jurisdiction of the subject matter and of the parties by consent; and (3) that the federal question was not timely raised. We will, therefore, reply to these points.

RIGHT CLAIMED UNDER FEDERAL STATUTE.

The claim of the right under a federal statute was fully discussed in the petition (pp. 10-11). We cited the *Cumberland* case (237 U. S. 447) on the point that a defense of *res adjudicata* based on a judgment of a federal court adjudicating a right of *federal origin* raises a federal question for review. In answer thereto, respondents say (p. 9) that this is true when the plea is *denied* and not when the plea is *sustained* as in the instant case. Respondents would be correct if this were an appeal under 237(a). The requisite there is the denial of the right. This review, however, is sought by certiorari under 237(b) and *whether the defense was denied or sustained is of no importance under that section* (Robertson and Kirkham on Jurisdiction of Supreme Court, § 55 and § 58, pp. 100, 102-103). It is also of no great importance how the federal question was raised in view of the fact that the Appellate Court *decided the federal question* (*Hill* v. *Smith*, 260 U. S. 592; *Whitefield* v. *Ohio*, 297 U. S. 431.) The defense of *res adjudicata* was based on the amendment to the Bankruptcy Act under § 77B. The adjudication, therefore, was *on a judgment of a federal origin* and this presents a federal question for review under 237(b) (*St. Louis, et al.* v. *Starrbird*, 243 U. S. 592).

JURISDICTION OF BANKRUPTCY COURT.

Respondents contend that the court properly sustained the defense of *res adjudicata* because the Bankruptcy Court acquired jurisdiction of the subject matter and of the parties by consent. If the issues were presented to the Federal Court

and decided by it there would be some merit to the argument. However, *the respondents urged on the appeal from the federal decision that these issues were not involved in the suit and that these issues are only involved in the independent suit pending in this cause* (R. 45-46). The Federal Court did not decide this issue and simply *denied the intervention* (92 F. (2) 778). We have cited authorities in the petition (p. 15) on the point that *denial of intervention may not be pleaded as a bar to an independent suit.*

THE FEDERAL QUESTION WAS TIMELY RAISED. This question was fully discussed in the petition (p. 11). Respondents overlooked that besides the federal question which was raised by the petition for rehearing on the point that the sustaining of the defense was in violation of the Fifth Amendment, the federal question was raised *defensively* by the respondents and *actually decided* by the Appellate Court in its opinion. We have also shown that the *additional federal question* based on the Fifth Amendment was timely filed in view of the decision of the Appellate Court (*Home Insurance Co.* v. *Dick*, 281 U. S. 397, 407).

THE REPLY TO THE DEFENSE OF RES ADJUDICATA DID NOT ADMIT THE SUFFICIENCY THEREOF. Respondents' contention (p. 14) that petitioners' reply to the defense of *res adjudicata* admitted the sufficiency is based on the Illinois law which existed *prior* to the adoption of the Civil Practice Act and they overlooked that the Civil Practice Act in Illinois abolished the former rule (See § 155, § 156 of the Civil Practice Act and the historical data in connection with these sections, *Smith-Hurd Illinois Annotated Statutes*, Chapter 110, page 143). We quote the following from the headline "Histrical Practice Notes":

> "Under the former equity practice a party by replying to a plea waived all objections to its sufficiency

and admitted the plea to be good in law and raised an issue on facts only. This section, together with the provision of § 155, *ante*, to the effect that there should not be any distinctions respecting the manner of pleadings between actions at law and suits in equity appears to change the former technical equity rule respecting a reply to a plea."

NON-FEDERAL QUESTION WAS UNTENABLE. This question was fully discussed in the petition (pp. 18-30) and the only answer in respondents' brief is that the court stated that it considered the merits. This alone, of course, is of no importance in view of the showing that this position was untenable.

For the foregoing reasons we urge the issuance of the writ.

Respectfully submitted,

MEYER ABRAMS,
Counsel for Petitioner.